STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHON RAPHEL TAYLOR, a/k/a ERIC FREEMAN,

Defendant-Appellant.

UNPUBLISHED
June 12, 2003

No. 238753
St. Clair Circuit Court
LC No. 01-001355-FH

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver less than fifty grams of cocaine, a controlled substance. MCL 333.7401(2)(a)(iv). He was sentenced as a fourth habitual offender, MCL 769.12, to twenty months' to forty years' imprisonment. We affirm.

I

This case stems from police surveillance of alleged drug activities and the execution of a search warrant covering a car and an apartment in Port Huron on April 24, 2001. Defendant and three others were apprehended in the apartment at the time of the raid. Two other males were stopped in the car. Police confiscated cocaine and drug paraphernalia from the apartment. The lessee of the apartment, Keith Loyer, pleaded guilty to attempted maintaining a drug house, and testified at trial that defendant had obtained cocaine in Detroit earlier in the day, had packaged the cocaine in the apartment bedroom, and had transacted drug deals with several others in the apartment. Although the police found the cocaine in the living room, where three of the men were apprehended, defendant was apprehended in the bedroom. Loyer testified that defendant and another man ran from the living room to the bedroom when the police raided his apartment, and the other man escaped through the window.

II

Defendant first argues that he was denied his right to a fair trial by the admission of his codefendant's guilty plea transcript and a statement therein, implicating defendant in the sale of cocaine. Defendant further contends that this evidence was inadmissible hearsay and that it

violated his right to confrontation. We agree that it was error to admit the evidence of his codefendant's guilty plea.

Generally, evidence of the conviction of an accomplice is inadmissible in the trial of a defendant accomplice. *People v Kincade*, 162 Mich App 80, 84-85; 412 NW2d 252 (1987). The admission of an accomplice's guilty plea as substantive evidence of a defendant's guilt may constitute error requiring reversal. *People v Barber*, 255 Mich App 288, 297; 659 NW2d 674 2003; *Kincade, supra* at 85-86.

> "Where two or more persons are jointly indicted for the same criminal offense which is in its nature several, or are separately indicted for such offense or for separate offenses growing out of the same circumstances, and are tried separately, the fact that one defendant has pleaded guilty or has been convicted is, as a general rule, inadmissible as against the other, since competent and satisfactory evidence against one person charged with an offense is not necessarily so against another person charged with the same offense, and since each person charged with the commission of an offense must be tried upon evidence legally tending to show his guilt or innocence." [*People v Eldridge*, 17 Mich App 306, 316-317; 169 NW2d 497 (1969), citing cf. *Bruton v United States* 391 US 123, 88 S Ct 1620, 20 L Ed 476 (1968).]

However, the guilty plea of an accomplice is admissible for purposes of impeachment or rehabilitation of a witness, where its use is appropriately limited. *People v Manning*, 434 Mich 1, 14 (Boyle, J.), 21 (Brickley, J.); 450 NW2d 534 (1990). It is the purpose for which the evidence is admitted that governs its proper use. *Id*. For example, a prosecutor may attempt to rebut an implication that its codefendant witness was motivated by self-interest in testifying against the defendant, by showing the nature of the concessions made in exchange for his testimony; however, the prosecutor's disclosure in this regard must be complete. *People v Crawl*, 401 Mich 1, 34; 257 NW2d 86 (1977).

In this case, it is not clear from the record the purpose for which the prosecutor sought to admit the evidence.[1] Citing *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993) and *People v Petros*, 198 Mich App 401; 499 NW2d 784 (1993), the prosecutor argued that the transcript of codefendant Lorenzo Bohanen's guilty plea was admissible in rebuttal as testimony of a codefendant implicating a defendant. The trial court agreed, but questioned whether the "statement under oath" could only be admitted as substantive evidence in the prosecutor's case in chief. The cited cases held that a nontestifying codefendant's inculpatory statement may be admitted as substantive evidence against a defendant without violating the Confrontation Clause[2] where a firmly rooted hearsay exception applies or where the presumptive unreliability of the statement is rebutted by particularized guarantees of trustworthiness. These cases do not address

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[1] Plaintiff has not filed a brief in this appeal, and thus we do not have the benefit of responsive argument to defendant's allegations of error.

[2] US Const, Am VI; Const 1963, art 1, § 20.

the admission of a codefendant's guilty plea and do not provide an exception to the general inadmissibility of guilty pleas as substantive evidence.

Although it appears the prosecutor may have had some general impeachment purpose in mind, our review does not convince us that the use of the evidence was proper in this case. Essentially, the prosecutor attempted to impeach defendant's denial of guilt with Bohanen's sworn concession of guilt and his statements, elicited by the prosecutor during the guilty plea, that defendant was involved in the charged drug activities.[3] This use runs afoul of the longstanding rule against admission of a codefendant's guilty plea, particularly here, where there was no plea bargain[4] with Bohanen and he did not testify at trial. See *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982) (prosecutor is not obliged to show that no consideration was offered for a witness's testimony).

Nonetheless, we do not conclude that reversal is required. Defense counsel objected to the guilty plea transcript on two grounds, 1) failure to show the declarant's unavailability, and 2) hearsay—that the statement was inherently unreliable. Counsel did not object to the admission of the guilty plea on the ground that a guilty plea is inadmissible, and therefore this issue is unpreserved. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1), *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Absent an objection, appellate review is limited to whether the admission of the evidence constituted plain error that affected the defendant's substantial rights. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

Given the independent evidence of defendant's guilt, discussed *infra*, including the testimony of codefendant Keith Loyer that established defendant's involvement in the drug activities, we conclude that the error did not affect defendant's substantial rights.

III

Defendant next claims he was denied a fair trial by the trial court's failure to sua sponte deliver a missing witness instruction, CJI2d 5.12, where the prosecution failed to call Bohanen (the same codefendant whose guilty plea transcript implicated defendant) as a witness at trial. Defendant claims that he is entitled to a new trial or a remand for development of the record concerning the alleged error. We disagree.

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[3] The codefendant testified to driving around and selling crack cocaine, and the prosecutor asked if defendant was involved in this. The codefendant said yes.

[4] After the jury retired to deliberate, and requested the trial exhibits, counsel discovered that a misdemeanor charge had in fact been dismissed against Bohanen; however, this was not a factor at the time the guilty plea transcript was admitted.

Defendant expressed his approval of the jury instructions both before and after the jury received its charge. He has therefore waived any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Tate,* 244 Mich App 553, 558-559; 624 NW2d 524 (2001).

Defendant argues that if this Court finds that the instructional error was waived on the basis of defense counsel's actions, then he was denied his right to the effective assistance of counsel. We disagree.

To prevail on a claim of ineffective assistance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial, i.e., there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome a strong presumption that counsel's action constituted sound trial strategy. *Id.* at 302. Because defendant failed to move for a new trial or an evidentiary hearing with regard to his claims, review is limited to mistakes apparent on the record. *Id*.

Defendant has failed to show that counsel's performance was either deficient or prejudicial. Defendant has not shown that the trial court was obligated to sua sponte provide the instruction at issue or that he was otherwise entitled to the instruction. See *People v Perez*, 255 Mich App 703, 708-711; ___ NW2d ___ (2003) (regarding use of the instruction and indicating the instruction is no longer viable in light of the decisions in *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995) and *People v Paquette*, 214 Mich App 336; 543 NW2d 342 (1995) [the prosecution no longer has any duty to produce res gestae witnesses and there is no due-diligence requirement to allow a change in the prosecutor's witness list].

The record indicates that following jury selection, defense counsel discussed with the court a note from defendant stating that defendant was dissatisfied that he had been unable to obtain witnesses on his behalf. Defense counsel informed the court that subpoenas he had issued for four witnesses had been returned to him as "unservable." One of the four witnesses, Bohanen, was also on the prosecutor's witness list, and the prosecutor indicated that every effort would be made to locate Bohanen. Defendant has shown no evidence that the prosecution failed without good cause to produce Bohanen (even though the prosecutor is no longer required to do so). *Perez, supra* at 707-709. Moreover, defendant has not shown that counsel's failure to pursue this matter was not trial strategy since it is unlikely that Bohanen's presence at trial would have benefited defendant in light of Bohanen's sworn testimony implicating defendant in the cocaine delivery activities.

IV

Defendant next alleges there was insufficient evidence to support his conviction of possession with intent to deliver cocaine. We disagree. In reviewing a claim of insufficient evidence, this Court views the evidence de novo in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant argues that the prosecution failed to establish the essential element of constructive possession. The element of knowing possession with intent to deliver has two components: possession and intent. *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Defendant contends the evidence was insufficient because there was no evidence linking him to cocaine the police found. However, a codefendant, Keith Loyer, testified that defendant had been in the room when the police kicked the door in and the cocaine was thrown to the floor. Once the cocaine was thrown, defendant ran into a bedroom. A defendant does not have to be found with the drugs in his hands to constructively possess them. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The essential question is whether the defendant had dominion or control over the controlled substance. *Id*.

Loyer also testified that defendant was at Loyer's house earlier in the day and was out of cocaine, so Loyer drove defendant to Detroit to buy some cocaine. After they returned to Loyer's house from Detroit, defendant was in possession of cocaine and gave Loyer a portion of it on credit. Defendant then went into the bedroom to package the cocaine into smaller baggies. Loyer testified that he saw defendant conduct other cocaine transactions at the house. Therefore, the jury could have concluded that defendant had "control" of the cocaine the police found.

V

Defendant next claims that the trial court abused its discretion in admitting drug profile evidence, allowing police officers to explain why an individual would give multiple names and explaining the use of a drug tally sheet. We disagree.

We review the admission of evidence and expert testimony for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). The admissibility of drug profile evidence must be determined on a case by case basis. *Id*. at 54-55. Drug profile evidence is permitted as background or modus operandi evidence to aid the jury in understanding the evidence in controlled substance cases. *Id*. at 53-54. The expert testimony is admissible if the expert is qualified, the evidence gives the trier of fact a better understanding of the evidence or assists in determining a fact in issue, and the evidence is from a recognized discipline. *Id*. at 53. The testimony regarding the use of multiple names was not used as impermissible substantive evidence of defendant's guilt, i.e., that defendant possessed the drugs found in the apartment. Further, the police officer testified on cross-examination that using a different name did not mean that an individual was dealing drugs.

With regard to the drug tally sheet, the record indicates that defendant may have opened the door to this testimony when defense counsel asked codefendant Loyer if he was keeping track of the money he owed defendant for drugs and Loyer responded that he did not write down the amount owed, but he was sure that defendant kept track of it on something. Regardless, the court sustained defense counsel's objection to improper testimony about the drug tally sheet at one point, striking the testimony that the sheet was used to keep track of money owed defendant. *Id*. at 63. The court also stated that the ultimate conclusion whether the paper was a drug tally sheet was for the jury. To the extent that the identification and description of the paper as a drug tally sheet was improper, we find the error harmless, given the strong circumstantial evidence,

including the direct testimony concerning defendant's role in the drug activities, and the trial court's limiting directives concerning the evidence. *Id*. at 64.

VI

Defendant claims that the prosecutor engaged in misconduct during the trial. We find no merit in this unpreserved issue. First, defendant has not demonstrated plain error in the prosecutor eliciting testimony from a witness concerning his plea to a lesser offense in exchange for his testimony. *Manning, supra* at 14-21; *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "Although the introduction of an accomplice's promise of truthfulness is not necessarily error, it is error if used by the prosecutor to suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988). Viewing the prosecutor's remarks in context, we are persuaded that they do not rise to the level of error requiring reversal. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). Further, defendant has failed to show that he was prejudiced. The trial court issued a detailed and specific instruction cautioning the jury to carefully evaluate Loyer's testimony. Accordingly, appellate relief is not warranted. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

VII

Defendant next claims the trial court committed error requiring reversal by overruling the defense's objection to testimony regarding a firearm because he was not charged with the offense and no firearms were found in the apartment. We disagree. The admission of evidence is reviewed for an abuse of discretion. *Bahoda, supra* at 289. Because the court justifiably reasoned that the jury needed the testimony to understand why a gun was listed in the search warrant, the trial court did not abuse its discretion. *Id*. at 289-291. Further, the trial court issued an appropriate cautionary instruction in allowing the testimony.

VIII

Defendant next alleges that he was denied a fair trial when the prosecutor impeached a non-alibi witness by asking why he had not gone to the police sooner with the information. Because defendant failed to object to this testimony at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. Considering the brief questioning and the nature of the witness' testimony, that defendant was not involved in the sale of a gun, we find no error affecting defendant's substantial rights.

IX

Defendant next argues the trial court abused its discretion by allowing a note, purportedly written by defendant, to be introduced into evidence without a proper foundation. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Bahoda, supra* at 288-289. Testimony of a witness with knowledge satisfies the requirement of authentication when there is "[t]estimony that a matter is what it is claimed to be." MRE 901(b)(1). Based on the witness' recognition of defendant's voice, defendant's use of the witness' street name, the note's reference to the witness' debt owed to defendant, and the

hand reaching from defendant's cell, the trial court did not abuse its discretion in admitting the note into evidence.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten F. Kelly